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IN THE

Supreme Court of the United States

HEWLETT-PACKARD COMPANY EMPLOYEE BENEFITS ORGANIZATION INCOME PROTECTION PLAN,

Petitioner,

v.

DONALD JEBIAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to this Court's Rule 15.8, petitioner respectfully submits this supplemental brief to address the *amicus curiae* brief filed by the United States. The government argues that certiorari should be denied for three reasons, none of which has merit. The government's contention that the decision below is correct (U.S. Br. 12-16) is addressed fully in the petition (Pet. 17-21) and would be the subject of merits briefing if this Court were to grant plenary review. *See also* n.*, *infra*. The government's remaining arguments—that there is no "real" conflict among the circuits (U.S. Br. 6-12) and that the question presented is of limited and diminishing importance (*id.* at 16-20)—turn a blind eye to the confusion that continues to frustrate the lower courts, ERISA fiduciaries, and plan participants. As numerous recent cases confirm, similar facts continue to yield inconsistent and unpredictable outcomes. Indeed, after the government's *amicus* brief was filed, the Ninth Circuit rendered a decision that is clearly at odds with its decision in this matter, prompting Circuit Judge Rymer to specifically note the pending petition for a writ of certiorari in this case as a means of resolving the extant conflict. *Gatti* v. *Reliance Standard Life Ins. Co.*, — F.3d — , 2005 U.S. App. LEXIS 9895, at *19 (9th Cir. 2005) (concurring in part). Only this Court's review of this important issue of federal benefits law can resolve this chaos in the circuits and restore the "uniform administrative scheme" that ERISA was designed to establish. *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 9 (1987).

I. Recent Decisions Confirm That A Mature Conflict Among The Circuits Persists

Petitioner has previously demonstrated the three-way split among the circuits regarding the standard of review courts should apply to an ERISA plan administrator's denial of a benefits claim when that claim is "deemed" denied as a

result of passage of time. *See* Pet. 11-17; Pet. Reply 4-8. The government now attempts to gainsay that conflict, contending in essence that all of the circuits have adopted, or are likely to adopt, a "context-dependent" approach. U.S. Br. 6-12. The government is wrong.

Several appellate rulings issued after petitioner filed its reply brief confirm that the circuits remain committed to divergent approaches to this issue. For example, in *Finley* v. *Hewlett-Packard Co. Employee Benefits Organization Income Protection Plan*, 379 F.3d 1168 (10th Cir. 2004), and in a matter involving the same benefits plan as is involved in this case, the Tenth Circuit unequivocally stated: "The circuits are split on this issue." *Id.* at 1173 n.5 (describing at least three different approaches to this issue followed by the circuits, specifically noting that the Ninth Circuit's decision below conflicts with the approaches followed by the Fifth and Eighth Circuits). In April of this year, the Second Circuit likewise observed: "Our sister courts of appeal have again split on the question of whether a 'deemed denied' claim is always entitled to de novo review." *Nichols* v. *Prudential Ins. Co. of Am.*, 406 F.3d 98, 2005 U.S. App. LEXIS 6837, at *29 (2d Cir. 2005) (identifying three-way split). Thus, the courts faced with this issue continue to acknowledge the divergent approaches petitioner has identified—a divergence that warrants this Court's consideration.

Indeed, the disharmony resulting from these various approaches is underscored by the disparate results in recent cases. In *Finley*, the employee's claim for long-term disability benefits was denied by the plan's claims administrator. She filed an administrative appeal that included a new medical report. 379 F.3d at 1171. The claims administrator requested that she provide additional evidence. *Ibid.* The employee provided none, and the appeal was denied more than 120 days after it was filed. "Therefore, pursuant to both section 8(c) of the benefits document and the applicable ERISA

regulation, [the employee's] appeal was 'deemed denied.'" *Id.* at 1172. Although the Ninth Circuit held in the decision below that the late denial of an administrative appeal warranted *de novo* review, the Tenth Circuit in *Finley* reviewed the very similar denial there under an abuse of discretion standard. 379 F.3d at 1174-75. The *Finley* court reasoned that because the claims administrator's initial denial and statement of reasons could "effectively be applied" to the administrative appeal, and the delay did not "undermine [the court's] confidence in the integrity of [the administrator's] decision-making process," the administrator's decision would be reviewed for an abuse of discretion. *Ibid.* (citations omitted).

In *LaMantia* v. *Voluntary Plan Administrators, Inc.*, 401 F.3d 1114 (9th Cir. 2005), which also involved Hewlett-Packard's long-term disability plan, the claims administrator denied the employee's claim for long-term disability benefits. The employee filed an administrative appeal, and at her counsel's request the claims administrator granted an extension of time for the employee to submit medical reports in support of her appeal. *Id.* at 1117. Well over a year then passed without further communication between the employee and the claims administrator. *Ibid.* Eventually, the employee's counsel submitted further medical reports, and the claims administrator ultimately sent the claimant a letter denying the appeal on the merits. The final denial of the appeal occurred more than four years after the employee commenced her appeal. *Ibid.* The Ninth Circuit concluded that the "[m]ost significant[]" factor distinguishing *Jebian* was that in *LaMantia* the employee "was the party who sought an extension of time which caused the deadline to file documents to occur beyond the deemed-denial date." *Id.* at 1123. The court then noted the public policy consideration militating against an automatic *de novo* standard any time a deemed denial occurs, observing that "[o]therwise, claims administrators would have no incentive to allow extensions beyond the

deemed-denial period when claimants seek an extension." *Id.* at 1124. The court remanded the matter for decision under the abuse of discretion standard. *Ibid.*

LaMantia serves to illustrate the confusion this issue has engendered even within the Ninth Circuit. In the matter at hand, the very same claims administrator advised respondent that his claim would be "left open" to permit him to submit additional medical evidence in support of his claim if he so chose. It was the claims administrator's unilateral decision to give respondent more time to permit him to develop his record that caused the Ninth Circuit to rule that the *de novo* standard of review would apply to respondent's district court challenge of the decision to deny his claim—directly analogous to the decision that led the *LaMantia* court to apply the abuse of discretion standard.*

Most recently, after the government filed its *amicus curiae* brief in this case, the Ninth Circuit issued its decision in *Gatti* v. *Reliance Standard Life Insurance Co.*, — F.3d —, 2005 U.S. App. LEXIS 9895 (9th Cir. 2005). In *Gatti*, the employee administratively appealed a denial of benefits, and the administrator affirmed the denial 177 days after receiving the request for review, which was well after the occurrence of a regulatory deemed denial. *Id.* at *2-3. The administrator

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* The government, like the majority opinion below, attempts to perpetuate the myth that the claims administrator here failed to carry out its duties faithfully and effectively. U.S. Br. 15-16. VPA clearly informed respondent of what specific information was required, followed up with respondent when that information had not been received, and expressed a willingness to keep respondent's file open until it received that information. C.A. Supp. App. 69, 92; Pet. App. 35a. Judge Tashima criticized "the majority's characterization of the facts" and noted the district court's finding that the parties were engaged in "meaningful dialogue" regarding respondent's appeal. Pet. App. 29a-30a. Thus, the facts here would warrant abuse of discretion review under at least two of the three approaches the circuits have adopted. *See* Pet. 11-12, 14-17.

thereafter gave the employee a further opportunity to present new medical evidence, and the employee did so. Finally, 279 days after the appeal commenced, the administrator decided that the additional medical information did not warrant a reversal of the benefits denial. *Id.* at *3. The Ninth Circuit "conclude[d] that *Jebian* does not control the issue presented here, and h[e]ld that violations of the time limits established in 29 C.F.R. § 2560.503-1(h) [1998] are insufficient to alter the standard of review." *Id.* at *6. The court distinguished *Jebian* on the basis that the plan in *Jebian* contained "deemed denial" language, whereas the only deemed denial provision applicable in *Gatti* was the language of the regulation. *Id.* at *7. The *Gatti* court held that the proper standard of review is abuse of discretion, rejecting the employee's argument that "the 'deemed denied' language operates to cut off the administrator's discretion." *Id.* at *8. "Instead, we read the 'deemed denied' language to provide beneficiaries with a 'final decision' from which to appeal if the administrator has not made a decision within the timelines established in the regulation." *Ibid.* The court noted that "[n]othing in the history of ERISA or its regulations, nor in the precedent that binds us, indicates that the 'deemed denied' language is a temporal restriction on the administrator's discretion." *Id.* at *12-13.

Concurring in part in *Gatti*, Judge Rymer stated: "I agree with Judge Tashima's dissent in *Jebian* but am hard-pressed to say that 'deemed denials' can mean one thing if embedded in a Plan and another if established by regulation." 2005 U.S. App. LEXIS 9895, at *19 (Rymer, J., concurring in part). Judge Rymer would have deferred ruling on the standard of review issue or remanded the matter to the district court "pending the Supreme Court's decision whether to grant certiorari in *Jebian*." *Ibid.*

As these cases demonstrate, and as Judge Rymer recognized not 10 days ago, the circuits remain deeply divided re-

garding the standard of review. *See also* Pet. 11-17 (detailing three-way circuit split). The Ninth Circuit has recently added additional unique wrinkles to the law, further distancing its position from that of other circuits. *LaMantia* created a rule whereby the standard of review depends substantially on which party caused the delay. *Gatti* establishes that "deemed denied" regulatory language will be construed differently from virtually identical plan language. *LaMantia* and *Finley* are irreconcilable, because the administrator's delay in *Finley* nevertheless led to abuse of discretion review, whereas under *LaMantia* the Ninth Circuit would have applied the *de novo* standard. Moreover, the Fifth and Sixth Circuits are clearly on record as adopting a rule that deemed denials do not result in *de novo* review, and the government's attempt to sweep that prong of the circuit split under the rug by speculating that those courts might reach a different result if they were to address the question today (U.S. Br. 11-12) is unpersuasive. Thus, the circuits are plainly divided on this issue, and this Court's guidance is urgently needed.

II. The Question Presented Remains Important And Worthy Of Review

The government suggests that the Department of Labor's modification of the claims processing regulation in 2000 renders the circuit split here of diminishing importance. U.S. Br. 16-20. The government misunderstands the issue. As this Court has explained, the level of discretion conferred upon an administrative decision "is simply a matter of plan design," and the standard of review is not controlled by ERISA or its regulations. *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 385-86 (2002). Ultimately, the issue is a matter of construing plan language, and the question petitioner has presented (Pet. i) is not limited to the effect of the regulation, as the government mistakenly suggests. U.S. Br. I.

The Ninth Circuit's very recent *Gatti* decision correctly holds that under the 1998 version of the regulations, the oc-

currence of a regulatory deemed denial does not alter the standard of review. The result appears to be the same under the new regulation, which eliminates the concept of a deemed denial. However, as Judge Rymer's partial concurrence in *Gatti* cogently observes (2005 U.S. App. LEXIS 9895, at *19 (Rymer, J., concurring in part)), it makes no sense to hold that a regulatory deemed denial does not affect the standard of review, while construing virtually identical language in a plan—indeed, language added to the plan to track the regulatory provision—as depriving an administrator of discretion and to warrant *de novo* review.

Regardless of the impact of the new regulation, the fact remains that the courts of appeals continue to issue conflicting decisions under the former regulatory framework at a brisk pace, including several decisions within the past few months. The courts regard this issue as a matter of continuing importance. Moreover, the government's *amicus* brief fails to acknowledge the "large leeway" that ERISA grants employers to design welfare plans as they see fit. *Black & Decker Disability Plan* v. *Nord*, 538 U.S. 822, 833 (2003); *see also Lockheed Corp.* v. *Spink*, 517 U.S. 882, 887 (1996). Because neither ERISA nor the amended regulation addresses the use of "deemed denied" language in plans, employers can and will continue to use such provisions, and cases raising the question presented here will continue to arise. The inconsistent, outcome-determinative approaches that the circuits apply regarding the standard of review call out for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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